



BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

POINT I

The City of Asbury Park was guilty of active wrongdoing in the construction of a concrete base, without adequate protection and contrary to the accepted practice, in the center of the traveled portion of the highway.

Public highways in the State of New Jersey are dedicated to the public use. Any obstruction which impedes that use is a nuisance. The case of *Durant v. Palmer*, 29 N. J. L. 544, decided in 1862, enunciated that fundamental principle of law which has been repeatedly reiterated. The Court of Errors and Appeals said:

“The street, and every part of it, by force of the common law, is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance. The traveling public have a right to suppose that there is no dangerous impediment or pitfall in any part of it, without a light placed to give warning of it or a suitable railing to protect from it.”

This fundamental principle of law has been restated by the same Court in *Fredericks v. Dover*, 125 N. J. L. 288; 15 Atl. (2nd) 784. Chancellor CAMPBELL said:

“The law is well settled that any obstruction or erection in a public highway which interferes with the rights of a person lawfully passing thereon amounts to a common or public nuisance for which

a municipality is charged with the responsibility if it was an active agent or instrument in the creation of the perilous condition."

The concrete base which was placed in the center of the public highway was, therefore, a nuisance. The traveling public was impeded in its lawful use of the highway. The petitioner, Eleanor G. Murphy, a stranger in the locality and a passenger in an automobile, was directly injured as the result of this obstruction. For such an action a municipality is liable if it has been an active agent in the creation of the perilous condition.

Statutory authorization does not shield a municipality from responsibility for injuries which result from its improper, negligent and wrongful performance of an authorized act. The controlling authority in New Jersey is the decision by the Court of Errors and Appeals in *Allas v. Borough of Rumson*, 115 N. J. L. 593; 181 Atl. 175; 102 A. L. R. 648. The Borough of Rumson erected a passageway to its Borough Hall but provided no protective ramp. A non-suit in favor of the defendant was reversed. In holding the Borough liable, the Court said:

"The wrongdoing here charged is no less than positive misfeasance within the contemplation of our cases. Misfeasance differs from malfeasance or nonfeasance. It has been defined as the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner, while malfeasance is doing an act which is positively unlawful or wrong."

and, at page 603:

"There is an obvious distinction between keeping a highway free from nuisances and affirmatively creating one. In the one case it is mere neglect of a public duty for which there is no action for a private injury; in the other there is positive misfeas-

ance. As was said in *Hart v. Freeholders of Union, supra*, 'there is no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury is inflicted by their wrongful acts, as distinguished from mere negligence.' "

This decision is recognized as the controlling pronouncement of municipal liability in New Jersey for acts of the local government authorized by statute. District Judge FORMAN in his opinion so held (Appellant—Appendix, 96a).

In *Fisher v. Nutley*, 120 N. J. L. 290; 199 Atl. 40, the Court of Errors and Appeals held the municipality responsible for placing within the public highway iron pipe, the presence of which resulted in injury to the plaintiff. At page 293, the Court said:

"In the present case the act of putting the pipe in the road was authorized but the manner was unauthorized, for the defendant was not authorized to place the pipe so that it protruded into the highway set apart for coasting, nor to place it there without warning or barriers."

In *Fredericks v. Dover*, 125 N. J. L. 288; 15 Atl. (2nd) 784, the Court of Errors and Appeals affirmed a judgment in favor of the plaintiffs who recovered damages for injuries sustained when the female plaintiff fell because of the improper construction of a metal covering over a storm sewer. Chancellor CAMPBELL, for the Court of Errors and Appeals, said:

"The law is well settled that any obstruction or erection in a public highway which interferes with the rights of a person lawfully passing thereon amounts to a common or public nuisance for which a municipality is charged with the responsibility if it was an active agent or instrument in the creation of the perilous condition."

District Judge FORMAN in his opinion denying the motion to set aside the verdict followed this definitely settled rule of the common law of New Jersey. Unquestionably, the concrete base in the center of the public highway constituted a nuisance, unless it was properly constructed. Two highway engineers of long experience testified that the manner of construction was improper. This proof was not rebutted. The City was the active instrument in the creation of this obstruction. If the City failed to use care and proper engineering practice in locating and erecting the base in the center of the highway, then under the decisions the City was guilty of active wrongdoing.

In the Appendix to this brief is a list of the cases in which municipalities have been held liable for wrongful acts. Municipalities have been held liable for excavating a hole in the street with no proper protection; for excavating a pavement and installing no guards; for placing an iron pipe in the public street; for placing an excessive amount of oil upon the highway; for installing a sewer cover; for lowering a street grade; for leaving an unguarded traffic standard in the highway; for erecting curbs of improper design; for constructing valley gutters and for excavating sidewalks without guarding the excavation. These various conditions have all been held to create liability upon the municipality in decisions following *Allas v. Borough of Rumson, supra*.

In every instance the municipality was acting under a general statute which gave it authority to perform the act in question. Such general statutes did not lessen the duty of the municipality to carefully and prudently perform the work so authorized. If the municipality, in its performance of the authorized work, wrongfully created a hazardous condition from which injury resulted, then for its active wrongdoing, the municipality remains liable. The uncon-

tradicted proof, in the case at bar, showed that a concrete obstruction was placed in the center of the traveled highway and resulted in serious injuries to a passenger in an automobile traveling thereon. The uncontradicted evidence proved that the obstruction had been placed in a wrongful and improper manner and this constituted active wrongdoing on the part of the City and under the common law of the State of New Jersey, the City was liable for the damages which resulted from its wrongful act.

POINT II

The City of Asbury Park cannot avoid liability for the obstruction created by it on a public highway, since there was no specific, definite, exact and precise legislation which legalized the obstruction.

An obstruction may be legalized by specific, definite, exact and precise legislative authority. If such definite, exact and precise authority exists for the creation of the obstruction, then the creator who complies strictly with the terms of such statutory authority is not liable for any injuries that may be caused by the obstruction erected by him. The character of the legislative authority is determinative of the existence of liability. General statutory authority (upon which the Circuit Court of Appeals relied in its opinion) is an insufficient warrant to permit the erection of an obstruction in a public highway with impunity.

The defendant, in the case at bar, relied upon two general statutes of the State of New Jersey which it claimed authorized the erection of the obstruction without resultant liability. The first is Paragraph 1 of Article 24, Chapter 152 of P. L. of N. J. 1917 (Appellant—Appendix, 84a). The latter statute is a general statute and authorizes a

municipality to light its streets and to erect and maintain on or under the streets and public places, necessary poles and equipment. This enabling statute vests New Jersey municipalities with the right of lighting their streets. No specific authority is granted in this statute to obstruct the streets. The statute is equally general with the statutes authorizing municipalities to erect and maintain municipal buildings, to construct, lay out and repair streets, to construct and repair sewers and drainage systems, to construct and repair curbs, to construct and repair sidewalks. All of the statutes authorizing these acts are general. In each instance where the municipality, under such general statutes, performed an act in a wrongful manner the municipality was held liable.

District Judge FORMAN, in his opinion, recognized the requisites of a statute sufficient to legalize an obstruction. The Circuit Court of Appeals did not distinguish between a general statute empowering a municipality to carry on its governmental functions, and statutes of exact, precise and definite terms legalizing obstructions. This distinction is well recognized in New Jersey.

In *Lorentz v. Public Service R. Co.*, 103 N. J. L. 104; 134 Atl. 818, the Court of Errors and Appeals held that the legislature may legalize what otherwise may be a nuisance. The elevated structure which caused the injury to the plaintiff had been authorized by a statute which is printed in full in the Appendix to this brief. This statute specifically defined the conditions under which the structure could be erected. It was admitted that the structure was lawfully there under permission of the municipal authorities. The Court of Errors and Appeals said:

“From what has been said, it should be sufficiently obvious that the structure in question was a lawful one sanctioned by legislative and municipal authority.”

The facts in the case *sub judice* are to the contrary. While in the *Lorentz* case, the structure had been erected strictly in accordance with legislative and municipal authority, in the present case, no specific authority appeared.

The Court of Errors and Appeals of New Jersey, shortly after its decision in the *Lorentz* case defined the requirements of a statute legalizing an obstruction in the highway. In *Howard v. Lehigh Valley R. Co.*, 106 N. J. L. 466; 150 Atl. 356, the railroad company had erected a concrete crossing signal in the center of a County highway pursuant to a resolution passed by the governing body of the County. A general statute gave the County full control of its highways. Chancellor CAMPBELL distinguished the *Lorentz* case saying:

"In that case the structure complained of was authorized by a municipal ordinance, for which definite and specific legislative authority existed and it therefore became, as it were, a legalized obstruction in the highway which it was within the power of the legislature to authorize . . . There is, however, another line of cases holding to the contrary where specific legislative authority to permit the obstruction of highways does not exist.

"Several statutes are cited by respondents as clothing the board of freeholders of Somerset county with specific and exact authority to grant the permission to respondents to legally erect and maintain the structures in question. Our examination of these acts brings us to the conclusion that none of them reaches that point."

In *Sammak v. Lehigh Valley R. Co.*, 112 N. J. L. 540; 172 Atl. 60, the Court of Errors and Appeals again laid down the same prerequisites to legalize an obstruction in the highway. The railroad company had erected a flasher in the center of the highway, claiming authority under the Public Service Commission Law and by a specific town

ordinance. The railroad company was held liable. The entire case turned upon the question whether the structure was legalized. The Court of Errors and Appeals said:

“The burden of proof is on the defendant to show that this structure which would otherwise be a nuisance was a ‘legalized’ obstruction. This it failed to do.

“The instant case is on all fours with *Howard v. Lehigh Valley Railroad Co.*, *supra*, where this court held that permission for the erection of a structure identical with this one, granted by the board of chosen freeholders of the county did not legalize the obstacle, but that there must be specific legislative authority to permit the obstruction of highways. There was in that case no statute clothing the board of freeholders with specific and exact authority to grant the permission to the railroad to legally erect and maintain the structure in question.

“And so in the instant case, there is an absence of definite and legislative authority for the erection of this concrete tower in the public highway of the village of Waverly, even for the purpose of placing a signal or sign post thereon, and its presence there, without lights, endangered ordinary travel by night and constituted it a nuisance; and the defendant was properly held responsible for the damage accruing to plaintiff whose car, without any negligence on the part of the driver thereof, collided with said tower.”

It is to be remembered that in the *Lorentz* case, there was definite, specific and exact authority to erect the elevated railway and it was admitted that the railway was erected in accordance with this authority and complied with the conditions precedent. The *Howard* and *Sammak* cases both declare that an obstruction in the highway is erected at the peril of the creator unless there is specific, exact, and definite legislative authority. This distinction

was well recognized by this same Circuit Court of Appeals in *Delaware, L. & W. R. Co. v. Chiara*, 95 F. 2d 663. The railroad company submitted to Jersey City plans and blue prints to build a bridge across the highway. The New Jersey statutes authorizing this permission are set forth in the opinion and established many conditions precedent. Under the authority of this statute, the railroad company then submitted to Jersey City blue prints of the proposed bridge and Jersey City passed an ordinance authorizing the bridge and defining with particularity the location of the columns. In the construction of this bridge, the railroad varied the design from the design required in the ordinance and thereafter secured the passage of an ordinance ratifying the altered construction. Judge BIGGS, in his opinion, discusses the *Lorentz*, *Howard* and *Sammak* cases and found that there was specific statutory authority to legalize the obstruction, saying:

“A literal interpretation of the language of the statute just quoted makes it apparent that a municipality may authorize or legalize the location of a railroad bridge within the wagonway of a public street or highroad in a position which, unauthorized, would constitute a nuisance. It is true, however, that the right of the municipality to grant the authority to erect such a structure is limited by the terms of section 30 to the end that greater safety may be secured to persons or property, or to the end that the construction and maintenance of other than grade crossings may be facilitated or for the purpose of providing for increased or improved terminal facilities and transportation service. In the case at bar, in our opinion, the crossing of Henderson street by the appellant is within the purposes set forth by the Legislature in the act. The grant to the appellant to cross Henderson street in the manner prescribed by the ratifying ordinance of March 6, 1934, by the municipal authorities seems to

us a proper exercise of the police power vested by the Legislature in the city of Jersey City, and in our opinion there was nothing unconstitutional in the delegation of this police power by the Legislature to the municipality and nothing unreasonable in the manner of its exercise by the city of Jersey City."

Thus the *Howard* and *Sammak* cases in the Court of Errors and Appeals of New Jersey and the *Chiara* case in the Circuit Court of Appeals for the Third Circuit, establish the rule that an obstruction in the highway can only be legalized by definite, exact and precise legislative authority.

A municipal corporation is a creature of statutory law. It finds its power to function in general statutes. All the numerous cases set forth in the Appendix involve acts performed by the municipality under authority conferred by general statutes.

Here, there is no specific, legislative authority or municipal ordinance which authorized the erection of the obstruction involved in the case at bar. The obstruction was not legalized by specific, exact and definite legislation. The City of Asbury Park is therefore liable for its active wrongdoing in so placing this obstruction in the highway without adequate safeguards for protection. The Circuit Court of Appeals in this case failed to recognize the distinction it had previously declared in the *Chiara* case.

POINT III

The concrete base was not part of a traffic system.

The Circuit Court of Appeals, in its opinion, said:

"It is evident that the standard was a part of Asbury Park's lighting and traffic system on Ocean Avenue."

This statement is contrary to the evidence and to the findings of the Trial Judge, District Judge FORMAN, who specifically held that the concrete bases were a part of the lighting system and did not have for their purpose the control and facilitation of traffic in the street (Appellant—Appendix, 94a). A city policeman (Appellee—Appendix, 2a), the Superintendent of Streets of the City of Asbury Park (Appellant—Appendix, 37a) both described the bases as part of the lighting system. Notwithstanding this testimony and the finding of District Court Judge FORMAN, the Circuit Court of Appeals held that the City had constructed the base for traffic control. This holding of the appellate court was a *sine qua non* for its decision which was based upon the general statute of 1923. This Act lacked every requisite prescribed by the decisions of New Jersey to legalize an obstruction in the highway. There is not a scintilla of evidence in the case that this structure was in any way constructed for traffic control. Bearing this fact in mind, the following statement of District Judge FORMAN, in his opinion, is most important:

“An examination of the act of the legislature submitted as the authority for the city to encroach upon the center of the traveled portion of the highway leads one to the belief that this authorization was given to municipalities for the purpose of permitting the erection and installation of safety devices in the control of traffic. The items named in the statute are of this nature. They are safety aisles, standards commonly called ‘silent policemen’, beacon lights, guide-posts, and other structures which the municipality may deem necessary for the safety and convenience of persons and vehicles using its streets. The city submits that the clause ‘other structures which it may deem necessary for the safety and convenience of persons and vehicles using the streets’ is of such a broad nature as to include the concrete

bases which supported lights installed in the center of the length of Ocean Avenue. I cannot agree that the statute contemplated this system of street lighting. The legislation was directed toward those devices which had for their purpose the control and the facilitation of traffic in the street rather than the lighting of the street."

Conclusion

The petitioner, Eleanor G. Murphy, was a traveler upon a public highway of Asbury Park and under the local law of New Jersey was entitled to the use of the whole highway free of any obstruction that would render its use dangerous. When the City of Asbury Park placed this obstruction in the highway it was under the duty to use the proper protection and safeguards so that the traveling public should not be incommoded in its use of the highway.

No specific, precise and exact legislative authority exists to warrant the creation of this obstruction. The burden of proof was on the City to show that the structure was legalized within such limits. It failed to do so. The Circuit Court of Appeals erred in its decision that the obstruction was legalized. The District Judge correctly stated the law. The decision of the Circuit Court of Appeals is contrary to the local law of New Jersey and has deprived the petitioner of a just and fair verdict, all amounting to a denial of due process.

The writ should be granted.

Respectfully submitted,

THEODORE D. PARSONS,
Counsel for Petitioner.

